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NO. 283810-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LISA UNRUH,

Appellant,

v.

DINO CACCHIOTTI, DDS and JANE DOE CACCHIOTTI, husband and wife and the marital community composed thereof,

Respondents.

Appeal from Grant County Superior Court
Honorable Evan Sperline
NO. 07-2-01238-5

REPLY BRIEF OF APPELLANT LISA UNRUH

STRITMATTER KESSLER WHELAN COLUCCIO

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I. RESPONDENT CACCHIOTTI'S STATEMENT OF THE CASE HIGHLIGHTS THE COMPLEX DETERMINATION OF NEGLIGENCE.

The primary reason the discovery rule applies to professional malpractice cases is because the consumer of professional services frequently does not have the means or ability to discover professional malpractice. *Matson v. Weidenkopf*, 101 Wn. App. 472, 483, 3P.3d 805 (2000) (quoting *Peters v. Simmons*, 87 Wn.2d 400, 405, 552 P.2d 1053 (1976)). This case involves the question of whether knowing that an act or omission caused a particular result is the same as knowing that the act or omission was below the standard of care. Defendant Cacchiotti's own statement of the case highlights the fact that this case is factually complex. Despite admitting that this appeal does not concern the merits of Plaintiff's claim (Brief of Respondent (BOR) at 5), Dr. Cacchiotti attempts to argue the validity of Plaintiff's negligence claim as if this were a summary judgment motion, arguing that, "due to the size of her upper jaw there was insufficient room for her permanent teeth to erupt into. The lack of room eventually caused some of her teeth to loosen and fall out." BOR at 5-6.

Dr. Cacchiotti has been inconsistent as to what exactly caused Lisa Unruh's root resorption. Dr. Cacchiotti told the Unruhs that Lisa's root resorption was simply a matter of some people not being able to wear braces because of effects on their roots. CP 247. In the trial court, Dr.

Cacchiotti argued that the cause of Lisa's root resorption was unknown, or idiopathic. CP 23 ("she lost several of her teeth due to an extremely rare and unusual medical condition causing root resorption"); CP 25. Now Dr. Cacchiotti argues that the cause was known -- her teeth not having enough room. BOR at 6.

Respondent's own inconsistent assertions highlight the complicated nature of determining whether negligent orthodontic care caused Lisa's loss of teeth. Lisa Unruh was told that the extended use of orthodontics caused her teeth to fall out, but she was not aware that the manner in which the orthodontics were applied fell below the standard of care. *See generally* Opening Brief of Appellant at 7-11. She and her step-mother believed that the cause of her teeth falling out was a genetic predisposition to adverse consequences from braces until they were told otherwise in March 2006, at which point they began to suspect negligence on the part of Dr. Cacchiotti. CP 248. When Lisa Unruh and her parents knew or should have known that her loss of teeth was caused by a violation of the standard of care by Dr. Cacchiotti is a question of fact for a jury to decide. Because the evidence supports a finding that the breach of duty element of her cause of action for dental malpractice was not discovered until March 2006, summary judgment was improper, and this Court should reverse the decision of the trial court.

II. RESPONDENT'S TIMELINE ONLY SHOWS THE DATES LISA LEARNED THAT ORTHODONTICS CAUSED HER LOSS OF TEETH, BUT FAILS TO SHOW WHEN SHE LEARNED THAT HER LOSS OF TEETH WAS CAUSED BY ORTHODONTIC CARE THAT FELL BELOW THE STANDARD OF CARE.

Lisa Unruh's course of dental treatment is complex, making her determination of the existence of a cause of action for dental negligence extremely difficult and elusive. Respondent highlights examples of when Lisa Unruh knew that her loss of teeth was caused by braces. BOR at 15-16. However, Respondent's timeline fails to include relevant events within proper context. To clarify the relevant facts, Appellant provides revisions to Respondent's timeline in bold:

Date	**Event**
January 3, 1986	Unruh is born. CP 70, lines 8-10.
March 3, 1995	Unruh became a patient of Dr. Cacchiotti. CP 54; CP 97.
June 14, 1995	Dr. Cacchiotti applied partial braces to Unruh's upper teeth. CP 97.
September 20, 1995	Dr. Cacchiotti applied the remaining braces to Unruh's upper teeth. CP 97.
January 9, 1996	Dr. Cacchiotti applied braces to Unruh's lower teeth. CP 97.
July 1, 1997	Dr. Cacchiotti removed the braces from Unruh's lower teeth. CP 98.
August 26, 1999	Dr. Cacchiotti removed the braces from Unruh's upper teeth. CP 99.
October 20, 2000	Unruh presents to Dr. James Lord to obtain an overdenture. Unruh's stepmother tells Dr. Lord that Unruh lost several teeth due to braces (CP 138-138), **but not that she was aware the application of those braces was negligent or**

	fell below the standard of care.
November 14, 2000	Unruh's last visit to Cacchiotti. CP 99.
October 2000 to January 2001	Unruh testified that Dr. Lord told her that Dr. Cacchiotti's care caused her to lose her teeth (CP 27; CP 71, lines 18-24; CP 50, line 1), **but not that his care was in any way below the standard of care.** ***See*** **BOR at 9; CP 27, 71.**
August 5, 2002	Unruh presents to Dr. West. CP 128
November 19, 2002	Unruh returns to Dr. Cacchiotti to discuss jaw surgery. CP 100
March 12, 2003 May 15, 2003 June 10, 2003	Dr. Cacchiotti applies partial braces in preparation for Unruh's jaw surgery. There is no allegation of negligence regarding this treatment. CP 100.
July 29, 2003	Dr. West performs jaw surgery. CP 134-136
2003	Unruh learns from Dr. Bryant that the problem with her roots is due to orthodontic care (CP 71, lines 18-20; CP 73, lines 5-8; CP 74, line 5 to CP 75, line 5), **but not that the care received was in any way below the standard of care.**
January 3, 2004	Unruh turns 18 years old. CP 70, lines 8-10
May 25, 2005	Unruh and her father again learn from Dr. Bryant that the problem with her roots is due to orthodontic care (CP 154, lines 5-19 (referring to medical record at CP 143)), **but not that the care received was in any way below the standard of care.**
March 19, 2006	Unruh, her father and her stepmother again learn from Dr. Bryant that the problem with her roots is due to orthodontic care. **They also learn that the problem with her roots was not due to genetic factors as they previously believed, which raised the question of whether Dr. Cacchiotti's orthodontic care was below the standard of care.** CP 244-45. The Unruhs decide to pursue a lawsuit **[actually they decided to consult a lawyer].** CP 123, lines 12-25-CP 124, lines 1-18, CP 125, lines 14-21.
January 3, 2007	Unruh turns 21 years old. Statute of limitations expired **unless Plaintiff discovered the elements**

	of her cause of action less than one year before this date. CP 70, lines 8-10.
January 12, 2007	Unruh's counsel sends letter regarding mediation to insurance carrier (CP 315-16), **the adjuster for which is the only person that responded when Unruh sent a 90-day notice of intent to sue directly to Dr. Cacchiotti and thereafter acted as Dr. Cacchiotti's agent in handling Lisa's claim.** CP 309.
October 1, 2007	Lisa files her lawsuit. CP 1-8.

III. WHETHER LISA KNEW THAT THERE WAS A BREACH OF THE STANDARD OF CARE BECAUSE SHE WAS TOLD BY OTHER PROVIDERS THAT THEY WOULD HAVE DONE THINGS DIFFERENTLY IS A QUESTION OF FACT FOR THE JURY.

Because reasonable minds could differ about the effect of knowledge that other providers would have treated Ms. Unruh differently, the granting of summary judgment was improper. "[A] court must deny summary judgment when a party raises a material factual dispute." *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-86, 78 P.3d 1274 (2003) (citing *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963)). "In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue." *Balise*, 62 Wn.2d at 199 (citing *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 337 P.2d 1052 (1959)). "In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach

different conclusions the motion should be denied." *Balise*, 62 Wn.2d at 199 (citing *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960)).

Being told that a different provider would have done something different does not amount to discovery of negligence. For example, in *Hayes v. Hulswit*, 73 Wn.2d 796, 797-99, 440 P.2d 849 (1968), the plaintiff, Hayes, brought a cause of action for dental negligence. During trial, Hayes submitted evidence that other treating dental providers would have treated her differently. *Id.* The trial court dismissed the case because testimony that another provider would have treated Hayes in a different manner did not amount to evidence that the defendant, Hulswit, was negligent. *Id.* In affirming the trial court, the Supreme Court stated:

> It is true that Dr. Crutcher, testifying by deposition, stated that it was standard procedure to take an X-ray if a person came to the office with this type of complaint; however, there is no testimony to establish that defendant's failure to X-ray plaintiff's jaw during this period was negligence on his part. In fact, negligence is negatived; for Dr. Smith, testifying for plaintiff, observed that the oral surgeon who performed the first operation could tell by visual inspection at the time of the operation and by palpation the extent of the malalignment; the X-ray would merely have confirmed what he already knew.
>
> In the last analysis, all that plaintiff's evidence establishes is a difference of professional opinion as to diagnosis and treatment. This alone is not evidence of malpractice.
>
> Our disposition of this case is governed by the rule announced in *Richison v. Nunn*, 57 Wn.2d 1, 16, 340 P. 793 (1959), and recently reaffirmed in *Versteeg v. Mowery*, Wn.2d 754, 435 P.2d 540 (1967):

> The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. In such cases, the court must hold that there is nothing upon which the jury may pass, the reason being that the jury may not be allowed to accept one theory to the exclusion of the other.
>
> The judgment is affirmed.

Id. at 800 (quoting *Richison v. Nunn*, 57 Wn.2d 1, 16, 340 P.2d 793 (1959), *cert. denied*, 364 U.S. 816, 81 S. Ct. 46, 5 L. Ed. 2d 47 (1960)).

As in *Hayes*, Lisa Unruh's knowledge that other providers may have engaged in different treatment, does not amount to knowledge that Dr. Cacchiotti was negligent. Being told by a different dentist or orthodontist that he or she would have treated her dental condition differently only establishes a difference of professional opinion, not evidence of malpractice. *See* BOR at 19, 25; *Hayes*, 73 Wn.2d at 800.

Respondent's argument that Dr. Bryant's use of the word "shouldn't" establishes knowledge of negligence amounts to argument about questions of fact. *See* BOR at 19, 25. Dr. Bryant's statement to Lisa that she "shouldn't have had braces" does not imply negligence on the part of Dr. Cacchiotti. Dr. Bryant had the benefit of hindsight, and his statement could easily have been interpreted by Lisa to mean that, in light of the genetic predisposition that she then believed she had, which became

known only after Dr. Cacchiotti applied braces to her teeth, not at the time the braces were put on, she should not have had braces.[1] Because disagreements between medical/dental providers about appropriate treatment options are to be expected,[2] the fact that a subsequent provider recommends a course of treatment that differs from the first provider's recommendation does not amount to knowledge that the first provider was negligent.

Simply put, Lisa Unruh was not made aware of a breach of duty by Dr. Cacchiotti based on knowledge that other dental providers would have treated her dental condition differently, without anything more indicating that Dr. Cacchiotti's treatment fell below the standard of care.

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[1] Dr. Bryant's statement that she "shouldn't have had braces" is similar to a statement that "you shouldn't have eaten that spicy food" after someone eats spicy food and complains about a stomach ache. The statement does not mean there was anything wrong with the food. The statement simply means that for the person who ate it, because of an ulcer or some other condition, it was not a good idea, although others might be able to eat the same food and enjoy it without any complaints at all.

[2] There are often more than one treatment options for a condition – for example, physical therapy vs. surgery; biopsy vs. "watchful waiting"; different surgical approaches and techniques; different types of medications; medication vs. diet/exercise. The fact that one doctor or dentist pursues one of several possible treatment options and that another doctor or dentist might have a different opinion about the best treatment option does not mean that the first doctor or dentist was negligent, and does not indicate to a reasonable patient that the first doctor or dentist's treatment was below the standard of care. It simply indicates a difference of opinion about treatment options, which is not uncommon.

IV. LISA DID NOT LEARN THAT THE REASON FOR HER TOOTH LOSS WAS ANYTHING OTHER THAN BRACES, COMBINED WITH A GENETIC CONDITION, UNTIL MARCH 2006.

Lisa only learned of the existence of possible negligence by Dr. Cacchiotti in March 2006, when she learned that the genetic predisposition explanation for her root resorption was no longer credible. Respondent, in trying to impute knowledge to Lisa, states, "One would also have to ignore that Dr. Bryant plainly stated that he 'did not agree with Dr. Cacchiotti's decision to put [Lisa] in braces at all." BOR 25. The statement attributed to Dr. Bryant is actually the words of defense counsel in questioning Lisa Unruh. CP 74. Dr. Bryant denied that he told Lisa his opinion about the orthodontic treatment provided by Dr. Cacchiotti. Even though Dr. Bryant believed from the first time he saw Lisa that her case was a "disaster" (CP 185), he testified that he would not have told her that:

> I do everything I can to smooth things over. I don't ever, ever – even though I don't recall it, I don't ever try to offer those kinds of opinions to inflame situations.
>
> I feel really good when I can act as a mediator and work things out when things have gone wrong between a patient and a previous doctor or another specialist.

CP 186. Dr. Bryant's testimony is clear that he did everything in his power to avoid saying anything to Lisa or her parents that would have suggested that Dr. Cacchiotti had committed malpractice. Dr. Bryant did not ever directly tell the Unruhs that he believed Dr. Cacchiotti was

negligent. Dr. Cacchiotti's claim that "Dr. Bryant specifically disparaged Dr. Cacchiotti's treatment" (BOR 19) is refuted by Dr. Bryant's own testimony. He never criticized Dr. Cacchiotti's treatment. He merely indicated that he felt other courses of treatment would have been preferable, not that Dr. Cacchiotti's treatment decisions were negligent or below the standard of care.

The mere fact that Lisa lost teeth after Dr. Cacchiotti's orthodontic treatment does not mean that she knew or should have known that Dr. Cacchiotti's treatment was below the standard of care:

> An [orthodontist] does not guarantee the results of his or her care and treatments.
>
> A poor . . . result is not, by itself, evidence of negligence.

WPI 105.07 (citing *Miller v. Kennedy*, 91 Wn.2d 155, 588 P.2d 734 (1978) and *Watson v. Hockett*, 107 Wn.2d 158, 727 P.2d 669 (1986)).

The Unruhs only discovered the possibility that Dr. Cacchiotti was negligent during a March 2006 appointment with Dr. Bryant, when it was learned that the facially valid explanation for Lisa's root resorption – orthodontics combined with what she understood to be a genetic predisposition for adverse side effects from braces – no longer held up. Respondent asserts that "Dr. Bryant conveyed the same substantive information in both the 2003, 2005, and 2006 conversations with Unruh." BOR at 26. That is not true. Dr. Bryant conveyed one crucial piece of

information in 2006 that had not been revealed in 2003 and 2005, which clued Lisa and her step-mother into the possibility of negligence on the part of Dr. Cacchiotti:

> I wasn't sure what the cause was. I had no idea until – I'm trying to think when it was. I think it was – we went to see a slide show at Dr. Bryant's office, and that's when . . . they were getting ready to prepare her mouth for implants.
>
> And he gave us a slide show on patients he had done and was giving Lisa an idea of what her teeth would look like. And we were sitting there, and I asked him, I said, "Why are her teeth falling out?" I said, **"Was it something hereditary?" And he said, "No, she has root reabsorption.** [sic]
>
> And I said, "What does that mean? I have no idea." And he said, "It is caused from braces being put on and kept on too long. This is what the cause of root reabsorption [sic] is." **And I said, "Okay. So this wasn't a birth defect or" – I said – he said, "No, that was the cause of her loss of teeth."** And I said, "Okay. Thank you."

CP 244-45 (testimony of Margaret Unruh) (emphasis added). While Lisa was told in 2003 that braces caused the root resorption, she and her parents believed that it was braces combined with a genetic predisposition to the condition. *See* CP 246 ("There's some people meant to have braces on, and some people that aren't, and she's one that shouldn't have had.") (testimony of Margaret Unruh); CP 247 ("[Dr. Cacchiotti] said there are people that should have braces on and people that shouldn't, and Lisa was one that shouldn't because it was affecting the roots of her teeth.")

(testimony of Margaret Unruh). It was only when Lisa's belief that she had a genetic predisposition to root resorption in response to braces – based on what Dr. Cacchiotti himself had told her – was dispelled by Dr. Bryant that she learned of all the elements of her cause of action. Defendant Cacchiotti simply dismisses this inconvenient fact out of hand and fails to provide any substantive response. BOR at 27-28.

V. *WOOD v. GIBBONS* IS DISTINGUISHABLE.

Respondent cites *Wood v. Gibbons*, 38 Wn. App. 343, 685 P.2d 619 (1984), for the proposition that "a plaintiff only must know of a *possible* breach of duty." BOR at 22 (emphasis in original). The plaintiff in *Wood* knew significantly more than Lisa Unruh: "In summary, Mr. Wood was told starch powder was a possible cause of his injury, knew of a lawsuit with similar facts, and even sought the advice of an attorney." Wood, 38 Wn. App. at 349.

Unlike the plaintiff in *Wood*, Lisa Unruh had no knowledge of another lawsuit with facts similar to hers, had no knowledge that negligent application of braces could cause root resorption and tooth loss, and never contacted an attorney until after she learned from Dr. Bryant that the cause of her tooth loss was not genetic, as she previously had been led to believe. Dr. Cacchiotti told Lisa and her step-mother that it was braces, combined with the fact that she was the "type of person who should not have braces," that caused her tooth loss. CP 246-247. There is no

evidence that Lisa was aware of any similar lawsuits which would have put her on notice that possible negligence of Dr. Cacchiotti may in fact have been the cause of her tooth loss. Nor did she consult an attorney until she realized that the benign explanation for her tooth loss that she had been led to accept as true was actually false. As such, she cannot be charged with learning all the elements of her cause of action any earlier than the March 2006 meeting with Dr. Bryant.

VI. PLAINTIFF'S COUNSEL'S REQUEST FOR MEDIATION UNDER RCW 7.70.110 WAS MADE IN GOOD FAITH AND CONFORMED TO THE REQUIREMENTS OF THE STATUTE.

Respondent contends that Plaintiff's counsel's letter of January 12, 2007, which stated, "I am asking pursuant to Civil Rule 53.4 and RCW 7.70.100 and 7.70.110 that the statute of limitations be extended one year for the purpose of mandatory mediation" was somehow ineffective to toll the statute of limitations for one year under RCW 7.70.100. CP 315. Counsel's unequivocal request to mediate this claim was acknowledged by Dr. Cacchiotti's insurance adjuster:

> Thank you for your letter of January 12, 2007. **You have requested mediation based on RCW 7.70.100 and, therefore, we agree that the statute of limitations is tolled for one year by RCW 7.70.100.** We will endeavor to resolve the case within that time frame.

CP 318 (emphasis added).

Respondent claims that this unequivocal request for mediation is actually like the letter in *Breuer v. Presta*, 148 Wn. App. 470, 473-74, 200 P.3d 724 (2009), which read:

> I think it would be useful to set out briefly the claim against Dr. Presta to be considered in the event there is any desire to either mediate or attempt settlement negotiations of this claim prior to the time that we have to file suit....
>
> ....
>
> I am awaiting the surgeon's records and billings with regard to this treatment and when I have them I will be in a position to discuss the value of this claim and if Dr. Presta is interested, we would be willing to consider negotiating an appropriate resolution of the claim.

The letter in *Breuer* made no mention of the statute, made no request for tolling under the statute, and made no specific request[3] for mediation.

Breuer is irrelevant to the issues in this case. Unlike the letter in *Breuer*, Plaintiff's counsel's letter in this case specifically asked for mediation pursuant to RCW 7.70.100 and specifically mentioned tolling

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[3] The *Breuer* court looked to the plain meaning of "request":

> [A] "request" is "1: the act of asking for something ... [or] ... 2a: an instance of asking for something: an expressed desire." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1929 (1993). We accord a plain and ordinary meaning to terms that are not defined by the statute unless a contrary intent appears in the statute. *Perkins Coie v. Williams,* 84 Wn. App. 733, 736-37, 929 P.2d 1215 (1997).

Breuer, 148 Wn. App. at 475.

the statute of limitations under RCW 7.70.110. The letter was perfectly clear, as acknowledged by Defendant Cacchiotti's insurance adjuster. The request for mediation clearly tolled the statute of limitations.

VII. RCW 7.70.110 HAS NO REQUIREMENT THAT AN OFFER OF MEDIATION BE SERVED ON THE DEFENDANT PERSONALLY.

Respondent would have RCW 7.70.110 act as a "gotcha" to plaintiffs. *See* BOR at 33. RCW 7.70.110 provides:

> The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

Plaintiff's counsel in this case made a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a lawsuit. The statute of limitations was therefore tolled for one year.

Nothing in RCW 7.70.110 dictates to whom the request for mediation need be made, instead referring only to making a request for mediation of "a dispute". While the Legislature has specified that a 90-day notice of intent to sue must be mailed to the defendant personally, it chose not to specify any such requirement with respect to a request for mediation. *Compare* RCW 7.70.100 *and* RCW 7.70.110.

In construing RCW 7.70.110, the Court should consider and give effect to the legislative intent. *State v. Cooper,* 156 Wn.2d 475, 479, 128

P.3d 1234 (2006) ("Statutory interpretation requires courts to give effect to the legislature's intent and purpose in passing a law."); *Arborwood Idaho, L.L.C. v. City of Kennewick,* 151 Wn.2d 359, 367, 89 P.3d 217 (2004) (A court's "fundamental objective in construing a statute is to ascertain and carry out the legislature's intent."); *Tenino Aerie v. Grand Aerie*, 148 Wn.2d 224, 240, 59 P.3d 655 (2002) ("The first role of a court is to examine the language of a statute while adhering to the legislature's intent and purpose in enacting it."); *Tarver v. Smith*, 78 Wn.2d 152, 155, 470 P.2d 172 (1970) (main purpose of statutory interpretation is to ascertain and give effect to legislative intent); *State v. Lee*, 96 Wn. App. 336, 341, 979 P.2d 458 (1999) ("[I]f the language remains susceptible to two constructions, one of which carries out and the other defeats the statute's manifest purpose, the former construction should be adopted."); *State v. Gilbert*, 33 Wn. App. 753, 755-756, 657 P.2d 350 (1983) (where statute is subject to two interpretations, that which best advances the legislative purpose should be adopted). The obvious purpose of RCW 7.70.100 and RCW 7.70.110 is to encourage pre-litigation mediation of malpractice cases to reduce expenses associated with these cases. RCW 7.70.110 goes so far as to provide that a request for mediation extends the statute of limitations by one year, to encourage plaintiffs to attempt to resolve their claims through mediation before filing lawsuits. Given this legislative intent, directing a request for mediation to an insurance adjuster

makes perfect sense because it is ultimately the insurer's decision whether to offer funds to settle a case. The insurer, not the defendant personally, is responsible for paying defense and indemnity costs on claims and has control of decisions regarding settlement of claims.

As a practical matter, defendant medical providers never respond to litigation correspondence. They refer legal matters to their malpractice insurers to handle on their behalf, as occurred in this case. For example, when served with a ninety-day notice of intent to sue, it was not Dr. Cacchiotti that responded to the notice, but an insurance adjuster on his behalf. CP 309. Adopting the construction argued by Respondent – a construction which has no basis in the text of the statute – would require plaintiffs to submit requests for mediation to health care providers they have no direct contact with and would be contrary to the customary practice of dealing with insurance adjusters rather than defendant health care providers personally on medical/dental malpractice claims, after the notice of intent to sue is served and an adjuster has been assigned to the claim.

Our courts have recognized that insurance adjusters act as agents for their insureds in handling claims. In *Colacurcio v. Burger*, 110 Wn. App. 488, 41 P.3d 506 (2002), the plaintiff filed a lawsuit against a defendant in a motor vehicle collision case. The plaintiff moved for and was granted an order of default because the defendant did not file an

answer in a timely manner. The defendant did not receive notice of the motion for default, even though prior to filing suit, the plaintiff had engaged in settlement negotiations with the defendant's insurance company. The court held that the defendant's insurance adjuster was acting as the agent of the insured/defendant, and that the communications by the insurance adjuster constituted an informal appearance:

> These actions [settlement negotiations] amounted to an informal appearance by Burger, as the claims adjusters were acting as her agents. Because Burger had appeared, she was entitled to notice of the motion for default under CR 55(a)(3).

Colacurcio, 110 Wn. App. at 491.

Given the fact that Dr. Cacchiotti's insurance adjuster, rather than Dr. Cacchiotti himself, responded to the notice of intent to sue, it was perfectly reasonable for Plaintiff's counsel to correspond directly with the insurance adjuster regarding mediation. In order for Dr. Cacchiotti's insurer to be aware of Plaintiff's claim, Dr. Cacchiotti would have had to contact his insurer himself and provide the notice of intent to sue to the insurer. Dr. Cacchiotti's silence in response to the notice of intent to sue, followed by communication from his insurance adjuster, made it clear that he, like every other defendant in a medical or dental malpractice case that has malpractice insurance, had turned the claim over to his insurance company, which assigned an adjuster to handle the claim on his behalf. In responding to the notice of intent to sue, it is clear that Dr. Cacchiotti's

insurance adjuster was acting as his agent. *See Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App. 53, 808 P.2d 1167 (1991) (where a written request for an estimate was made by insured, but sent to insurer; insurer accepted written estimate and authorized repairs; and the insured was kept abreast of the situation, the insurer was an authorized agent of the insured); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 400, 706 P.2d 212 (1985) ("The insurer on the other hand has a contractual obligation to act as the insured's agent and secure an attorney.").

Even if this Court is not convinced that an agency relationship existed as a matter of law, as Plaintiff contends, whether an agency relationship existed is generally a question of fact for the jury. *See Bill McCurley Chevrolet, Inc.* at 57 (citing *Orsi v. Aetna Ins. Co.*, 41 Wn. App. 233, 239, 703 P.2d 1053 (1985)).

VIII. THIS COURT SHOULD NOT ADDRESS DEFENDANT'S STATUTE OF REPOSE ARGUMENT RAISED FOR THE FIRST TIME ON APPEAL.

This Court should refuse to consider arguments based on the statute of repose that Dr. Cacchiotti raises for the first time on appeal. Dr. Cacchiotti admits that he "did not specifically discuss the eight-year statute of repose within RCW 4.16.350 before the superior court." BOR at 36. Under RAP 9.12, "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." *See also*

Souralki v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009). Nowhere in his briefing in the trial court did Respondent make any argument regarding the eight-year statute of repose.

For the first time in his response brief, Defendant Cacchiotti raises the statute of repose as a basis for his motion for summary judgment. Defendant Cacchiotti limited his motion for summary judgment to the statute of limitations. The Court should reject Defendant Cacchiotti's attempt to raise the statute of repose for the first time on appeal. *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 414-415, 553 P.2d 107 (1976); *White v. Kent Medical Center*, 61 Wn. App. 163, 168-169, 810 P.2d 4 (1991).

Because the statute of repose was not argued in the trial court, Plaintiff did not brief that issue. The statute of repose upon which Defendant Cacchiotti relies was held unconstitutional by our Supreme Court in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 960 P.2d 919 (1998) because it violates the privileges and immunities clause of the Washington State Constitution. *DeYoung*, 136 Wn.2d at 139. Although the Legislature reenacted the eight-year medical malpractice statute of repose in 2006, the language is the same as that previously found unconstitutional by the Supreme Court, and the rationale that the

Legislature gave for re-enacting the statute of repose was specifically addressed and rejected as inadequate in *DeYoung*:

> Defendants additionally argue, though, that the repose provision is constitutional under another conceivable set of facts – it rationally furthers the legitimate goal of repose for defendants and the barring of stale claims which are more difficult to establish because evidence may be lost or gone. As noted, compelling a defendant to answer a stale claim is a substantial wrong, . . . and setting an outer limit to operation of the discovery rule is an appropriate aim . . . . The goal is a legitimate one. Again, however, the minuscule number of claims subject to the repose provision renders the relationship of the classification too attenuated to that goal.
>
> We hold that the eight-year statute of repose in RCW 4.16.350(3) violates the privileges and immunities clause of the state constitution. . . .

DeYoung, 136 Wn.2d at 150.

This Court could reject Dr. Cacchiotti's statute of repose argument on the merits based on our Supreme Court's decision in *DeYoung*. Otherwise, the Court should decline Dr. Cacchiotti's invitation to consider a new basis for his summary judgment motion on appeal and should remand the case to the trial court to consider the issue, after the plaintiff is given a full and fair opportunity to brief this important issue of constitutional significance. An appellate court can only affirm the grant of summary judgment on an alternative ground not considered by the trial court when the parties had a full and fair opportunity to develop facts relevant to the decision and brief the issue. Where that opportunity has

not been available, the proper resolution of the appeal is not affirmance but remand. *Bernal v. American Honda Motor Co., Inc.*, 87 Wn.2d 406, 414, 553 P.2d 107 (1976). Particularly when an issue involves constitutional concerns, it should not be considered for the first time on appeal without the issue being developed legally and factually in the trial court. *Bernal*, 87 Wn.2d at 414-415.

Had Respondent called proper attention to the statute of repose as a basis for his motion for summary judgment, Appellant would have made several arguments not briefed in the trial court, including the following:

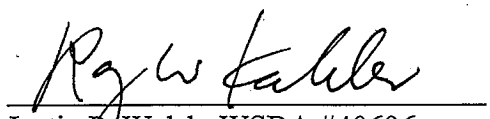
1. Amendments to RCW 4.16.350 re-enacting the eight-year statute of repose are unconstitutional, as the Supreme Court previously held in *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 150, 960 P.2d 919 (1998) ("We hold that the eight-year statute of repose in RCW 4.16.350(3) violates the privileges and immunities clause of the state constitution.").
2. RCW 4.16.350 provides for tolling of the time to commence an action, thereby including the statute of repose within its tolling language;
3. The purpose of RCW 4.16.350 is consistent with the purpose of the tolling statute, in providing additional time, regardless of the situation, for parties to attempt to settle disputes without resorting to litigation.

Appellant's arguments as to the constitutionality of the amendments to RCW 4.16.350 would have required extensive briefing, including a *Gunwall* analysis and analysis of the Legislature's intentions in re-enacting the eight-year statute of repose to determine if it was constitutionally invalid, as previously found in *DeYoung*.

IX. CONCLUSION

This Court should reverse the trial court's summary judgment order in favor of Dr. Cacchiotti. The testimony of Lisa Unruh and her parents establishes that she was unaware of the existence of all of the elements of a cause of action against Defendant Cacchiotti for dental malpractice until March of 2006. Further, the statute of limitations was properly tolled for one year from January 12, 2007 by the mailing of a written good faith request for mediation to Dr. Cacchiotti's insurance adjuster. Finally, Dr. Cacchiotti's arguments regarding the statute of repose were not raised in the trial court and should not be considered by this Court. Taking all facts and reasonable inferences therefrom in a light most favorable to the Plaintiff, this Court should reverse the trial court's order of summary judgment in favor of Dr. Cacchiotti and allow a jury to decide the disputed issues of material fact as to the statute of limitations and the discovery rule.

RESPECTFULLY SUBMITTED this 30th day of March, 2010.



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CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the foregoing **REPLY BRIEF OF APPELLANT LISA UNRUH** via U.S. Mail, postage prepaid, on the 30th day of March 2010, to the following counsel of record at the following addresses:

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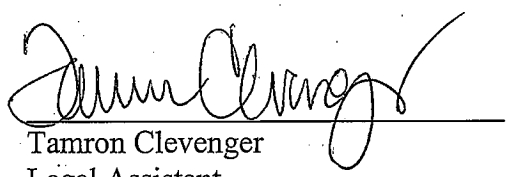

Tamron Clevenger
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